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IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-782

CLARENCE E. BRAASCH,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States.

Clarence E. Braasch, the petitioner herein, prays that a writ of certiorari issue to review a judgment of the United States Court of Appeals for the Seventh Circuit affirming his conviction of both conspiracy to commit extortion and making a false declaration before a federal grand jury.

OPINION BELOW

The opinion of the court of appeals (Appendix A, *infra*) is not yet reported.

JURISDICTION

The judgment of the court of appeals (Appendix B, *infra*, p. 22a) was entered on October 23, 1974. A timely petition for rehearing *in banc*, by petitioner herein, was denied on November 21, 1974 (Appendix C, *infra*, p. 23a). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

The first question pertains to the admission of massive particularized evidence of a conspiracy not charged in the indictment, and is presented for review in several subdivisions:

(1) whether excessive details of the uncharged "Big Club" conspiracy, virtually the only evidence connecting Clarence E. Braasch to the charged "little

club" conspiracy, created such a danger of unfair prejudice and issue confusion that exclusion thereof was mandatory;

(2) whether, in view of the total dependence of this petitioner's conviction upon the excessive details of the uncharged "Big Club" conspiracy, this petitioner was denied his right to be tried only on charges presented in an indictment returned by a grand jury; and

(3) whether the actions of the government, in stating before trial that, apart from the 53 taverns named in the indictment, ". . . the only other retail liquor establishment that the government intends to introduce evidence about is the Scotch Mist, 874 North Wabash, Chicago, Illinois" (R. 157, p. 4), and in reversing its position at trial, without genuine advance notice, through the 4-day testimony of former police lieutenant Robert W. Fischer (the 57th of its 61 case-in-chief witnesses, without whom there was no provable connection between the charged conspiracy and this petitioner) about the uncharged "Big Club" conspiracy, were inconsistent with fundamental fairness and denied this petitioner his right to due process of law, as well as his right to be informed of the nature and cause of the accusation.

The second question presented for review is whether this petitioner, charged in the indictment with both conspiracy to commit extortion and making a false declaration before a federal grand jury, was entitled to (a) separate trials of the 2 counts and/or (b) a severance from 14 of his codefendants each charged with the identical 2 offenses.

CONSTITUTIONAL PROVISIONS INVOLVED

Amendments V and VI of the Constitution of the United States provide in relevant part:

AMENDMENT V

"No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury (with inapplicable exceptions], nor shall any person . . . be deprived of life, liberty, or property, without due process of law. . . ."

AMENDMENT VI

"In all criminal prosecutions, the accused shall enjoy the right . . . to be informed of the nature and cause of the accusation. . . ."

STATEMENT

The consolidated jury trial of this petitioner (hereinafter sometimes "Braasch") and 22 of his former fellow officers of the Chicago Police Department, in the United States District Court for the Northern District of Illinois, upon a 16-count indictment (one conspiracy count and 15 false grand jury declaration counts), after evidence that commenced August 13, 1973, was submitted to the jury on the afternoon of October 3, 1973 (Tr. 7565), and 2 days later the jury returned 38 verdicts: 19 defendants were found guilty and 4 defendants not guilty upon Count I (the conspiracy count), while 11 defendants were also found guilty, and the same 4 defendants not guilty, upon the

15 false declaration counts (Tr. 7640-7650). This petitioner was found guilty of both conspiracy to commit extortion (Count I) and making a false declaration before a federal grand jury (Count XV) (Tr. 7640). This petitioner was sentenced to consecutive prison terms of 5 years (Count I) and one year (Count XV) (R. 347). The court of appeals affirmed this petitioner's conviction (Appendix, *infra*).

Count I of the indictment (R. 1), charging a conspiracy to commit extortion (18 U.S.C. 1951), identified 53 retail liquor dealers in Chicago's 18th Police District (par. 4), named Braasch as that district's commander from August, 1964 until May, 1970 (par. 1), alleged the movement of liquor in interstate commerce (par. 5) and charged a conspiracy among Braasch and 27 others (all of whom, except Braasch, were at one time or another members of the 18th Police District vice squad) to commit extortion, commencing in August, 1966 and affecting commerce, in that Braasch and the 27 others wrongfully used their positions as police officers to cause money to be obtained from the 53 named retail liquor dealers, through consent induced under color of right, for distribution among members of that vice squad. Count XV charged Braasch with 4 false material declarations on December 20, 1972 before the federal grand jury that returned the 40-page indictment on December 29, 1972: (1) that he was not told of the vice squad plans for collections from taverns; (2) that the taverns were never identified to him; (3) that he never approved the vice squad plans; and (4) that he had no knowledge of the actual vice squad collections.

Trial

At trial it was undisputed that no part of the vice club or "little club" collections was ever distributed to or re-

ceived by Braasch. Since it was the testimony of Robert W. Fischer that alone joined Braasch to the "little club" conspiracy charged in the indictment, and since this petition is premised in part upon excessive evidence of the uncharged conspiracy, the testimony of Fischer is hereinafter reviewed at length. Fischer was a sergeant and the vice coordinator of the 18th Police District from September, 1966 until his promotion to lieutenant during March, 1967, after which he was briefly detailed to the police training division and then given command of Area 5 Auto Theft (Tr. 4383, 4387, 4429-4431). In mid-November, 1966, Fischer met with 2 members of his vice squad, Edward Rifkin and John ("Skippy") Cello; Rifkin mentioned that ". . . things had been tough for the bar owners . . ." under Holzman (whom Braasch replaced in August, 1966) and proposed a monthly collection from taverns in the 18th Police District, for distribution among members of the vice squad, in exchange for freedom from harassment and petty arrests by vice officers, with 4 volunteered collectors: Rifkin and Cello by days and Napier and Mascolino by nights (the four, with Fischer, were the major government witnesses) (Tr. 4388-4391). Fischer told Rifkin he would find out, and a few minutes later he repeated the proposal to Braasch in his office (Tr. 4390-4393). After requesting that Fischer procure a list of the taverns, Braasch added (Tr. 4394; emphasis added):

> "'. . . I guess it is not a bad idea if these guys want to make a buck for themselves.' He said, '*We got our own thing going,* haven't we?'
>
> "I says, 'Yes.' And he says, 'Besides, I have had complaints from others and,' he says, 'specifically a Lt. Murphy; that we would get the best places lined up for ourselves and nobody else can seem to touch them.'"

A few minutes later Fischer met again with Rifkin and Cello, directed them ". . . to get a list each month . . ." and to avoid trouble spots: ". . . bars that patronized broads, which means, you know, catering to broads, prostitutes; no after hours; no minors" (Tr. 4395). Several days later, in the presence of Rifkin, Cello and Mascolino, Fischer received a list of taverns from Napier and was told by Rifkin that there were no trouble spots on the list; when Rifkin suggested that Braasch and Fischer should be "'. . . part of this'", Fischer declined but said he would speak to Braasch (Tr. 4396-4399). A few minutes later Fischer handed the list to Braasch in his office; Braasch deleted 2 trouble spots from the list and, when told that Mascolino would add several names to the list, Braasch told Fischer to get a list every month, which they would review for trouble spots (Tr. 4400-4401). Fischer then relayed Rifkin's suggestion that Braasch and Fischer be *part of this* and stated to Braasch his own opposition (Tr. 4402; emphasis added):

> ". . . if there is any complaints on these places and there has to be an arrest made, why, if we weren't taking money from it, why we could tell them to go out and make the arrest. But if we were taking money from the thing, we would be in kind of an awkward situation. They could very well say, 'Well, you are getting money from this place, too.' So, I suggested that we don't participate, partake in any money in this and besides, '*We got our own thing going and let's not get hungry.*'"

Braasch agreed (Tr. 4403). A few minutes later Fischer returned the list to Napier, in the presence also of the other 3 collectors, mentioned the 2 deleted trouble spots

and the monthly list for review, and ". . . told Rifkin that we would not be part of the club on a monthly basis" (Tr. 4404-4405). Fischer later received monthly tavern lists in December, January, February and March, which were shown by him to Braasch and then returned to Rifkin or Napier (Tr. 4405-4420). In mid-March, 1967, upon his promotion to lieutenant, Fischer was replaced as vice coordinator by Sergeant (and defendant) Edward J. Barry (Tr. 4429). Fischer could only recall 10 bars from the 5 monthly lists, and never distributed any of this money, either to Braasch or to any vice officer (Tr. 4436-4437). The bars on the monthly lists were commonly described by several police officers as ". . . vice club or little club" (Tr. 4441).

At this point Fischer, having *completed his narrative* of Braasch's involvement in the "little club" (after only 61 pages of transcribed testimony), was shifted into a second conspiracy (Tr. 4441), which he would describe at great length throughout *another full day of direct examination* (ending at Tr. 4681). As its launching pad for this extensive new and unheralded chapter of alleged police corruption, the government used Braasch's review of the December "little club" list (" 'Isn't that one of our places in the Big Ten?' ": Tr. 4411) which followed Fischer's directive to the collectors in late November that there were 10 Rush Street area bars not to be included in the "little club" (Tr. 4405-4408). These 10 bars were commonly described by several police officers as the "Big Ten" or the "Big Club"; this ". . . referred to ten bars on or about the Rush Street area, for which I was receiving money from a man by the name of Bill Gold" (Tr. 4442). After Bill Gold first telephoned him in mid-October, 1966, Fischer told Braasch that Gold said ". . . he had some business

that may be of interest" to Braasch and Fischer and that Rifkin had described Gold as a man who " 'represents the *gambling element* on the north side' " (Tr. 4455-4458; emphasis added). After Braasch told him to meet with Gold and listen to his proposal, Fischer met Gold the next day at Alexander's Restaurant near 79th and Exchange in Chicago, and received 4 $100 bills from Gold after their lunch (Tr. 4459-4463). Fischer returned to Braasch's office and described Gold's proposal (Tr. 4464-4466; emphasis added):

> "I told Braasch I had a conversation with Bill Gold and that he had offered us an arrangement; that the arrangement was *$3600 a month for the protection of gambling* in the 18th District; that there was another *$1500 a month to be offered for the protection of ten night spots* in the 18th District.
>
> "He described the gambling that he was talking about as bookmaking, horses, some policy, he said, and a little bolita. . . .
>
> "I told Braasch that I asked Gold if I could have a list of these places and he says, 'You would never get a list of the bookies or the gambling people. You will never get a list of that.' He says, 'If you agree to that arrangement, you will get a list of the ten night spots.'
>
> "I asked what our obligations were and he says, *'Don't look for the bookies and I would like a phone call before you raided a place;* that is made an arrest.'
>
> "And I told him I didn't think we could do that. And I asked what the obligations were for the ten night spots and he described it as no aggravation, which when I pressed him a little on that, he said,

'I don't want policemen going into these places throwing their flashlights around in people's faces and checking ID cards and so forth.'

"I told Braasch that Gold said that had I reached out for him earlier, that the thing could have gotten set up for October, but now that it was late in October, if we were to get it set up for November, why he would have to know about it in just a few days and Braasch said, 'Well, what about the vice men'?

"And I said, 'Well, the only two vice men I can think of that we would have to worry about would be Rifkin and Cello *because they were assigned to work gambling on days*, and as for the ten night spots, we could just kind of play that by ear and when it became necessary to tell—I was offering this idea—that when it became necessary—somebody made inquiries or somebody came up, then we would have to let the word out on that.

"So Braasch said, 'Well, let's give the whole package a try. Let's see.' . . .

"And then he leaned over and smiled and he says: *'You know, this guy Holzman is an easy act to follow.'*"

At Braasch's suggestion, Fischer then placed 2 $100 bills in Braasch's desk (Tr. 4468). A few days later, in the same restaurant, Fischer told Gold his proposal was entirely acceptable; Fischer then read the names of 10 bars, which Fischer listed on a paper napkin he retained; Gold described the payment procedure, to occur in a room at the Dearborn Hotel during the first 9 days of each month, after a telephone call to Fischer; and Gold said ". . . it would be Braasch's obligation to take care of the captains, the lieutenants and the vice men, out of this package of

money" (Tr. 4469-4472). On the next day, during lunch, Fischer informed Braasch of Gold's statements; Braasch said $500 would be paid to the captains and *nothing* to the lieutenants; Braasch and Fischer decided that $400 would be paid to Rifkin and Cello, and another $100 to Edward Barry; Braasch suggested that he and Fischer share the balance; and Braasch told Fischer to give him 2 envelopes each month, one with $500 for the captains and the other with the Barry-Braasch share, and to make direct payments to Rifkin and Cello (Tr. 4474-4476). The November payment from Gold to Fischer was $5,500, including an extra $100 Gold said was for Fischer's inconvenience and an extra $450 he said was for the lieutenants: "[h]e said that *some of them had been over to the shirt store complaining that they heard things were going and there was nothing for them. I think the term used was 'their end', or something like that*" (Tr. 4487-4489; emphasis added). Gold also then asked Fischer to straighten out 2 sergeants that were bothering 2 "Big Club" members (Tr. 4489). When Fischer returned to Braasch and mentioned the lieutenants' complaints, Braasch told him to take care of the lieutenants and also to keep the extra $100 himself; Braasch aiso said he would speak to the watch commanders about the 2 sergeants (Tr. 4491-4492). The Braasch-Barry share of the November payment (identical tc the Fischer share) was $2,200 or $2,300 (Tr. 4498-4500). The December payment from Gold also was $5,500 and the Braasch-Barry share and Fischer were each about the same as November (Tr. 4502-4503). According to Fischer's record of receipts and disbursements commencing in January, 1967 (Gov. Ex. 103), the January 1967 payment from Gold was $6,600, which Gold explained: "[h]e said, 'there is an extra $960 in the envelope. *Some of the sergeants have been over to*

the Shirt Store complaining that they weren't getting their end' " (Tr. 4508-4529; emphasis added). Braasch later told Fischer to forget about the sergeants, and to divide the $960 between Braasch and Fischer (Tr. 4509). The January Braasch-Barry share was $2,590 (Tr. 4529). In late January, at Alexander's Restaurant, Gold introduced Fischer to "Pat Riley" (actually Dan Glitta), his February replacement, who in turn said he would use a motel for the February payment; in February Fischer did receive $6,600 from Glitta at the Holiday Inn on Lake Shore Drive (Tr. 4531-4536). The February Braasch-Barry share was $2,590 (Tr. 4536). The March payment from Glitta at the Mart Inn was $6,360; the death of Bill Gold was discussed and Glitta said, "'. . . I will be handling *his spot* from now on. So we will just keep on doing things the same way'"; and the March Braasch-Barry share was $2,442.50 (Gov. Ex. 104) (Tr. 4539, 4551-4552; emphasis added). In mid-March, 1967 Braasch and Fischer met in a Lincoln Park parking lot and discussed Fischer's promotion and preference to be assigned to Area 5 Auto Theft; they agreed that Fischer would continue the monthly "Big Club" collections, that Fischer's monthly share would be reduced to $500, that Fischer's successor as vice coordinator (Barry) would receive $1000 each month, and that Fischer was to explain everything to Barry except the amounts involved (Tr. 4555-4558). For the next 22 months, from April, 1967 through January, 1969, Fischer continued to make the collections from Glitta and the distributions (in 5 envelopes per month, one of which contained Braasch's share) to Braasch; according to Fischer's records (Gov. Ex. 105 through 111), the monthly amounts through February, 1968 were as follows (Tr. 4558-4600):

Month	*Total Payment*	*Braasch's Share*
April 1967	$6,810	$3,710
May	6,660	3,560
June	6,360	3,260
July	6,360	3,260
August	6,210	3,110
September	6,210	3,110
October	6,210	3,110
November	6,360	3,835
December	6,360	3,260
January, 1968	6,210	3,110
February	6,210	3,110
	$69,960	$36,435

Fischer's records of receipts and distributions from March, 1968 through January, 1969 were destroyed in the spring of 1971; during each of those 11 months the total payment from Glitta was around $6,500 and Braasch's share was around $3,200 to $3,300 (Tr. 4620-4622). Except for one delivery to Barry, and 3 deliveries to Braasch at a gas station and 2 restaurants, Fischer's delivery of the 5 envelopes during each month from April, 1967 through January, 1969 was made to Braasch at Braasch's home, 9739 South Bell in Chicago (Tr. 4568, 4589-4595, 4599-4600, 4622-4623). In early February, 1969 Glitta informed Fischer that "'[t]hose people want to knock it down . . . five hundred [']and he says they are rather insistent on it. And Glitta asked me how do you think your boss would feel about that . . ."; when Fischer told Braasch about the $500 reduction the next evening at Braasch's home, "Braasch appeared angry and said, 'I think I will just put the whole thing down. . . . I will let you know'" (Tr. 4625-4628). Several days later, on a Saturday in Dan Ryan's Woods, Braasch told Fischer: "'I am going to put the whole thing down. Just don't bother to see your friend

Glitta anymore'" (Tr. 4630). Fischer never again received money from Glitta (Tr. 4631). Fischer did, however, receive a telephone call from Glitta in mid-February, 1969, and within 2 hours met with Braasch in Braasch's home; Braasch explained that Barry (Fischer's replacement as vice coordinator) had been authorized by him to confer with Glitta about "the package" and the $500 reduction; as Braasch put it, "'I can't afford to have it knocked down $500. *I have got additional expenses. . . .* I guess you have never heard of Linsky'" (Tr. 4632-4637; emphasis added). Fischer was, in fact, well aware that Linsky was Deputy Chief of Patrol for Area 6 and Braasch's immediate superior (Tr. 4638). Several weeks later, at either Chances R or the Pickle Barrel on Wells Street, Fischer asked Barry why he reached out on his own to replace Fischer, and Barry explained that he had been instructed by Braasch, that he was not a volunteer (as Braasch had told Fischer) and that everything had been straightened out (Tr. 4639-4641). *Fischer's total collections from Gold and Glitta during 27 months were around $165,000 and Braasch's share was around $85,000* (Tr. 4641-4642). The original members of the "Big Club" were: The Velvet Swing, Pigale, Club 19, Ad Lib, 6 East Chestnut, Whiskey A Go-Go, Bourbon Street, Casanova, Crystal Pistol and The Nite Life (Tr. 4665). Supplemental members during Fischer's 27 months were: Beer Joint, Down the Street, Scotch Mist, Las Vegas, House of Eng, Cat's Eye and Little Las Vegas (Tr. 4666). Fischer described the special features and entertainment offered by various "Big Club" members (Tr. 4667-4672). Fischer (despite his assignment elsewhere) was permitted to testify that, during the 27 months of his collections, he recalled *no arrests* by officers of the 18th Police District on the premises of "Big Club" members (Tr. 4673).

Appeal

Relative to the introduced evidence of the uncharged "Big Club" conspiracy, the court of appeals ruled that the evidence was relevant proof of this petitioner's "motive" and that the degree of this collateral proof was justified (Appendix, *infra*, p. 16a):

> "True it is that detailed evidence as to a similar, contemporaneous conspiracy has a potentially prejudicial effect, but here that effect was outweighed by the importance of this motive evidence as well as the District Court's cautious and thorough limiting instructions. . . ."

The court of appeals also held that this petitioner ". . . had both notice and opportunity to meet the Government's proof of concurrent criminal conduct" (Appendix, *infra*, p. 16a).

Relative to the severance questions, the court of appeals ruled joinder of the conspiracy and perjury (or false declaration) counts was proper and ". . . has now been given full approval by this circuit" (Appendix, *infra*, p. 17a), and ruled further that a single trial of the 15 allegedly perjurious defendants, in which the jury was charged ". . . to render separate verdicts on each defendant", was also proper since ". . . the massive duplication of effort entailed in separate trials is not justified absent a more specific claim of prejudice . . ." (Appendix, *infra*, p. 17a).

REASONS FOR GRANTING THE WRIT

As previously set forth in the Questions Presented, there are 5 submitted reasons for review on writ of certiorari, 3 pertaining to evidence of the uncharged "Big Club" conspiracy (reviewed in the Statement) and 2 pertaining to pre-trial denials of severance.

1. *Unrestricted evidence of the uncharged "Big Club" conspiracy.*

The court of appeals approved the government stratagem of injecting enormous "Big Club" details before the jury (including a variety of such sordid deeds as syndicate contract killings), a *sine qua non* to any conviction of Braasch, on the grounds that its ". . . potentially prejudicial effect . . . was outweighed by the importance of this motive evidence as well as the District Court's cautious and thorough limiting instructions. . . ." (Appendix, *infra*, p. 16a). There can be no dispute about the "importance" of this evidence: the government's case against Braasch was dependent entirely upon the procured and virtually uncorroborated testimony of former police lieutenant Robert W. Fischer, from whose shattered credibility the government desperately needed some maneuver to divert the jury's attention.[1] Rather than serving to favor such admis-

[1] For example, for 16 months commencing in November, 1968, while he was taking around $6,500 each month from the syndicate, Lieutenant Fischer was assigned to Inspectional Services and was responsible for reviewing and inspecting the conduct of police officers; he never shared his secret with anyone at police headquarters (Tr. 4807-4809). On November 9, 1972 (shortly after

(continued on following page)

sion, however, the "importance" of such collateral and crippling proof should serve to underscore the need for sensitive judicial regulation and for strict confinement to necessary details. The Ninth Circuit, for example, correctly holds that the stronger the government's case, the less is the need for exclusion. *United States* v. *Parker*, 469 F.2d 884, 894 (9th Cir., 1972). The court of appeals in the case at bar has spawned an unwise and isolated precedent that moves in the opposite direction, inviting the government to project such elaborate contamination into future trials where its evidence is otherwise weak. Apart from creating a test of "importance", the court of appeals ignored the mandatory restraint of *necessity* illustrated in another Seventh Circuit panel's recent reversal, *United States* v. *Ostrowsky*, 501 F.2d 318, 323 (7th Cir., 8-5-74): "The evidence of the other crime need only be clear and convincing: it need not, indeed should not, involve a trial within a

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government witnesses Cello, Rifkin and Mascolino had purged their contempt of immunity orders and thus secured their release from jail), Fischer was escorted to the United States Attorney's office where, asked to explain any corruption in the 18th Police District, he stated repeatedly that he knew nothing (Tr. 5002-5007, 5020-5021). Even when his tongue had been loosened by an immunity offer, Fischer was still cautious enough not to mention Ostrowsky (Tr. 5017-5018); Ostrowsky, a widely reputed auto thief (Tr. 5138-5139), paid Fischer $200 each week from mid-1970 until December, 1971, with an extra $500 thrown in (Tr. 4813-4815, 5012-5017). Marcus Cohen, a junk yard operator, after Fischer accused him of bribery in March, 1971, also became a periodic benefactor (Tr. 5027-5029). Fischer testified that in March, 1967, he voluntarily reduced his share of the "Big Club" from around $2,500 to only $600 each month; in short Fischer said he gladly walked away from around $59,000 otherwise his between April, 1967 and January, 1969 (Tr. 4995). He also testified that, between October, 1966 and January, 1969, he privately received around $174,420 in syndicate cash from Bill Gold and Dan Glitta, and then took the money home.

trial. . . . But having decided to admit the evidence the court must also limit the evidence to the quantity that is necessary to the purpose for which it is admitted." The petitioner's unhappy posture in the trial at bar was a classic example of a man charged with one offense and placed on trial for another, with no restraint applied by either the trial judge or the government upon the amount of collateral proof introduced.

The second justification by the court of appeals, ". . . the District Court's cautious and thorough limiting instructions . . ." (Appendix, *infra*, p. 16a), was misconceived for 3 reasons. First, no limiting instruction was given until Fischer's direct examination had indelibly contaminated the jury (Tr. 4441-4681). Secondly, the limitation itself (". . . only as it relates to Braasch or Barry's motive and intent in connection with the conspiracy charged in Count I of the indictment and you cannot consider this evidence for any other purpose") was meaningless to a jury which had never seen Count I of the indictment and had not been told *which* of the 2 conspiracies was in fact charged. Thirdly, the opinion's crucial reliance upon ". . . the effectiveness of these carefully drawn instructions" (Appendix, *infra*, p. 16a) is not well founded. *Contra*: *United States* v. *Byrd*, 352 F.2d 570, 574 (2d Cir., 1965); see also *Bruton* v. *United States*, 391 U.S. 123, 135 (1968).

In suggesting a conflict with other courts of appeal and a serious departure from the accepted and usual course of judicial proceedings, this petitioner respectfully invites the Court's attention to a revealing sequence of the "Big Club" presentation. Although Fischer had described to prosecutors the "Big Club" conspiracy at length in an interview 2 months earlier (Tr. 4877), the government filed a formal document on March 22, 1973, after this petitioner's

request, disclaiming any intention to transcend the borders of the indictment except for one tavern (R. 157, p. 4), and the government's opening statement on August 13, 1973 was consistent with that unrevoked disclaimer (Tr. 21, 30). Secretly departing from the trial procedure of submitting advance briefs upon delicate issues of evidence, the government boldly and without warning elicited from its 20th witness (Napier) the *hearsay* that Bill Gold told him ". . . that he was giving the monthly gambling package to Commander Braasch . . . [and] that Commander Braasch was going to keep all of the gambling . . ." (Tr. 2352). Clearly displeased and perplexed, and anxious not to abort the protracted trial despite mistrial requests, the trial judge expressed his loss of control (Tr. 2357; emphasis added):

> "The fact is in the fire as far as this witness is concerned now, so all we can do is follow through *on the expectation that he does tie it up. . . .*"

After and perhaps because of that crucial ruling, on the advent of Fischer to the witness stand the trial judge refused to bar or even to regulate the "Big Club" presentation: "*I will not restrict the Government* on the introduction of the evidence, so that the motions are denied" (Tr. 4356; emphasis added). Repeated objections and mistrial requests throughout Fischer's 4-day testimony were denied (Tr. 4446-4447, 4482-4486, 4526-4528, 4606-4616, 4685-4687, 4919-4921 and 5205-5223), although the trial judge did reveal his uneasiness with the government's refusal to exercise self-restraint (at 4921):

> ". . . The only witness who could testify to the conspiracy, which went in to prove motive and intent of your client [Braasch], must come in through Fischer and not through Rifkin. I have no intention of muddying the waters in that same sense. I knew nothing

> about the elements that Mr. Fischer was going to put in. I knew as little as any man who has ever heard a case as to what the Government's evidence would unfold. . . ."

Any doubt about the government's diversionary "Big Club" purpose, and about the futility of its self-proposed limiting instructions, was erased during its closing argument, which repeatedly reminded the jury of Fischer's self-proclaimed duties as Braasch's "bag man" and used his testimony to smear this petitioner: ". . . the only thing that Clarence Braasch did not have time to do was to go pick up the money. That is what he had Robert Fischer for. Fischer became his bag man. . . ." (Tr. 6963-6972). The case at bar, clearly illustrating governmental misuse of evidentiary rules to confuse the issues, mislead the jury and engineer a conviction, does indeed call for the exercise of this Court's power of supervision.

2. *Prejudicial variance.*

An inextricable issue in the government's "Big Club" presentation is whether, in view of the absolute distinction between the "extortion" conspiracy charged in the indictment, and the uncharged "extortion" conspiracy upon which this petitioner's conviction was premised, the record poses such a confused "trial within a trial" that, as expressed in *Stirone* v. *United States*, 361 U.S. 212, 217 (1960), ". . . there was a variance in the sense of a variation between pleading and proof. . . . [which] here destroyed the defendant's substantial right to be tried only on charges presented in an indictment returned by a grand jury." Although confronted with this issue in this petitioner's original brief (p. 28), reply brief (p. 9) and petition for rehearing (p. 7), the court of appeals never expressly resolved this claim. Since *Stirone* commands ". . . that a

court cannot permit a defendant to be tried on charges that are not made in the indictment against him" (361 U.S. at 217), this Fifth Amendment claim is indeed serious and worthy of this Court's review.

3. *Concealment of government plans to introduce elaborate "Big Club" details.*

The government's pretrial answer to this petitioner's motion for a bill of particulars described the Scotch Mist as the only retail liquor establishment, other than the 53 named in the indictment, about which ". . . the government intends to introduce testimony" (R. 157, p. 4). The government's opening statement at trial, with references to ". . . these 53 taverns" (Tr. 21, 30), was equally reticent about its powerful anti-Braasch strategy. Midway through its case, the government first mentioned in passing that ". . . we intend to have Fischer testify *generally* about the parcelling, because it is the only motive he had" (Tr. 2357; emphasis added). The real thrust of Fischer's extraneous testimony was not revealed, however, until the government had presented 56 of its 61 case-in-chief witnesses, and Fischer was next (Tr. 4346-4363). On appeal the government tried to justify its artfully concealed plans, and to distinguish *United States* v. *Baum*, 482 F.2d 1325, 1329-1332 (2d Cir., 1973), because "Fischer's name was set forth on the face of the indictment" (Gvt. Br., pp. 123-124). Not only did that apologia beg the very important question whether Fischer's "Big Club" narrative was the truth, but it ignored the more fundamental issue whether prosecutorial deception on the grand scale practiced here can be reconciled with fundamental fairness. The opinion of the court of appeals, in no way discouraging such practices in the future, simply concluded that *Baum* is ". . . distinguishable since appellant had both notice and oppor-

tunity to meet the Government's proof of concurrent criminal conduct" (p. 16). This petitioner respectfully disagrees that any genuine notice and opportunity to defend was afforded, and suggests that, because ". . . a person charged with a criminal offense has the right to assume that he will be tried for that offense only . . .", *Mills* v. *United States*, 367 F.2d 366, 367 (10th Cir., 1966), the government has no right to place a man on trial while suffering from the invited misconception that he is defending himself only against the charges in the indictment.

Opinions related to this specific issue are divided. The Supreme Court of Minnesota long ago adopted a rule that such other-crime evidence (with a few exceptions) ". . . shall not hereafter be received unless within a reasonable time before trial the state furnishes defendant in writing a statement of the offenses it intends to show he has committed, described with the particularity required of an indictment or information. . . ." *State* v. *Spreigl*, 139 N.W. 2d 167, 173 (Minn., 1965). The Eighth Circuit went the other direction in *McConkey* v. *United States*, 444 F.2d 788, 789-790 (8th Cir., 1971), cert. denied 404 U.S. 885, declining in *dictum* to follow *Spreigl* because it felt the proposed rule was a question to be decided elsewhere ". . . for purposes of uniformity in the federal system . . . rather than to be dealt with as a question of local policy or standard on the part of the Circuits individually" (at 790). As demonstrated in the case at bar, a frequently recurring incident, the need for a uniform pre-trial notice requirement is immediate and compelling, and deserves this Court's present attention and review.

4. *Joinder of conspiracy and false declaration counts.*

The divided opinion within the Seventh Circuit, upon this question, is demonstrated by the original and unani-

mous panel reversal in *United States* v. *Pacente,* 490 F.2d 661, 662-666 (7th Cir., 12-28-73), and the ultimate 4-2 affirmance, after rehearing *en banc,* in *United States* v. *Pacente,* 503 F.2d 543, 544-553 (7th Cir., 8-6-74). Particularly in view of the circumstances in the case at bar, including this petitioner's recall for testimony contrary to the charges in the 40-page indictment returned 9 days thereafter, a move inspired by the government's plan to shore up its weak conspiracy case against him with a false declaration count, this petitioner was severely prejudiced by the joinder and submission to a single petit jury of the conspiracy and false declaration counts.

5. *Joinder of defendants.*

The opinion of the court of appeals, suggesting that joinder of substantive and perjury counts ". . . has now been given full approval by this circuit" (Appendix, *infra,* p. 17a), failed to note the distinct circumstances here. The indicting grand jury had heard testimony from 2 groups of this petitioner's alleged co-conspirators (exclusive of any tavern witnesses): those who supplied the heart of the government's case-in-chief (Fischer, Cello, Mascolino and Rifkin) and those who were branded by the grand jury as perjurers and then placed in the dock with this petitioner (the 14 defendants charged in Counts II through XIV and XVI). The grand jury, far from simply announcing that the 4 chief governmental accomplice witnesses had provided sufficient evidence to dictate a trial, also announced that 14 of 22 of this petitioner's codefendants at trial (1) had contradicted one or more of the 4 chief governmental accomplice witnesses by self-exculpatory grand jury testimony and (2) had not been believed by the 23 indicting grand jurors. Not only did this petitioner suffer the personal stigma of probable guilt nat-

ural to being posted along the side of those 14 disbelieved "accomplices", which itself shattered the presumption of his innocence from the inception of trial, he also suffered a death blow to his opportunity to defend since there was a common defense that the testimony of the 4 chief governmental witnesses was not worthy of belief. The reliance by the court of appeals upon cautionary instructions (Appendix, *infra*, p. 17a) overlooked the fact that no such instruction was given until the final charge (Tr. 7555), some 16 days after the jury heard the collectively repudiated grand jury testimony (Tr. 5500-5581). The prosecutorial weapon of multiple perjury counts used to bolster accomplice testimony in a multi-defendant prosecution provides the government with a crippling advantage inconsistent with a fair trial.

CONCLUSION

For the reasons stated, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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December 20, 1974

APPENDIX A

In the
United States Court of Appeals
For the Seventh Circuit

No. 74-1000 thru 74-1017 and 74-1105

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

CLARENCE E. BRAASCH, EDWARD J. BARRY, JOHN M. GERAGHTY, DANIEL H. ARMSTRONG, THOMAS D. BATASTINI, NATALE R. CALE, JOHN CATALANO, MARTIN D. ESHOO, EDWARD F. FINN, CARL FLAGG, PHILIP R. GRANA, EDWARD McGEE, EMMONS P. RUSSELL, HARRY R. SALVESEN, JOSEPH A. SCHILLINGER, STEVE L. SENO, WILLIAM D. SWALLOW, THOMAS D. WEST and MIKE ZAKOIAN,

Defendants-Appellants

ARGUED JUNE 5, 1974 — DECIDED OCTOBER 23, 1974

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division — No. 72 CR 979
William J. Bauer, *Judge*

Before CLARK, *Associate Justice,** FAIRCHILD and STEVENS, *Circuit Judges.*

CLARK, *Associate Justice.* This prosecution, brought under the extortion statute, 18 U.S.C. § 1951[1], depicts a betrayal of public trust of the most alarming type to a

*Honorable Tom C. Clark, Associate Justice (Retired) of the Supreme Court of the United States, is sitting by designation.

[1] 18 U.S.C. § 1951:

(a) Whoever in any way or degree obstructs, delays, or affects commerce or the movement of any article or commodity in commerce, by *** extortion or attempts or conspires so to do, *** shall be fined not more than $10,000 or imprisoned not more than twenty years, or both.

(b) As used in this section — ***

free society: the corruption of the entire vice squad of the 18th Police District of Chicago over a period of many years.

The indictment covers the period from 1966 to 1970 during the tenure of Captain Clarence E. Braasch as Commander of the 18th Police District and names as co-conspirators more than two dozen police officers who were attached to the 18th District during all or part of that period, including Braasch and three vice coordinators, Sergeants Fischer, Barry and Geraghty. The facts are "stranger than fiction",[2] revealing a brazen extortion scheme involving a shakedown of some 53 bars, taverns and other business establishments serving alcoholic beverages and located within the District. Initially, four police officers on the vice squad — two during daylight hours and two at night — collected $100 to $150 per month from each of such establishments and divided this money, known as the "package", among the members of the vice squad. The *quid pro quo* on the part of the police officers was that they would "protect" the victims of the scheme — known as the "vice club" or "little club" — from enforcement of various regulatory laws and from loss of business, revocation of licenses and other disturbances, some of which were caused by manufactured police harassment.

In the regular operation of the "little club", a vice coordinator would obtain from the police officers of the vice squad a monthly list of the establishments that might be included in the club's collections and present this list to Captain Braasch who would then strike from it the names of those establishments that he decided should be excluded for various reasons. The resulting list contained the names of the club "members" until the next month's list was approved.

[1] *Continued*

(2) The term "extortion" means the obtaining of property from another, with his consent, induced by wrongful use of actual or threatened force, violence, or fear, or under color of official right.

(3) The term "commerce" means *** all commerce between any point in a State, Territory, Possession, or the District of Columbia and any point outside thereof ***.

[2] Byron, *Don Juan*, Canto XIV, St. 101.

From the testimony, it appears that a similar "club" existed in the district at least as far back as 1961, but abruptly ceased operations in the middle of 1966 when Captain James Holzman was appointed District Commander. The rapid change of command from Holzman to Captain Braasch in August 1966 marked the beginning of the conspiracy at bar.

Braasch brought with him Sergeant Robert Fischer to be his new Vice Coordinator. Soon after Braasch and Fischer began their new assignments, one Bill Gold, representing certain nightclub and gambling interests in the 18th Police District, telephoned Fischer that he wanted to see him about some business that might be of interest to him and his boss, Captain Braasch, and left his telephone number. Fischer reported the call to Braasch, who told him to see Gold. At lunch the next day, Gold told Fischer that he would pay Captain Braasch $3,600 per month to protect gambling operations in the 18th District from police harassments and arrests, and, in addition, he would pay $1,500 per month for Braasch to protect ten specific night spots also in the 18th District.

Fischer reported to Braasch, who promptly accepted the offer. This arrangement, known as the "big ten" or the "big club", started in operation in October, 1966, and continued at least during Braasch's tenure as Commander of the 18th District which ended in 1970. For some 27 months during the operation, Fischer acted as "bagman" for Braasch. The money was collected first from Gold and, after his death, from one Glitta, and ran as high as $6,810 a month. Initially, some of the money was passed on to key police officers, such as Braasch's friend, Barry, a group of Captains and Lieutenants, and two vice squad officers, Cello and Rifkin. The latter two were included because, as Fischer testified, "the only two vice men . . . we would have to worry about would be Rifkin and Cello because they were assigned to work gambling on day . . . ."[3] Fischer was succeeded by Barry

[3] After these payments Braasch and Fischer split the balance equally between themselves, except $100 which was given by Gold and Glitta to Fischer as a "tip". During the

as "bagman" for the "big club", but the record does not show the take during that period.

In November of 1966, some of the members of the Vice Squad approached Fischer with regard to their resumption of the pre-Holzman practice of collecting monies from retail liquor establishments in the District. The word about the "big club" had gone the rounds of the Vice Squad and its members were anxious to share in the proceeds. When Fischer made it clear that Braasch would not be sharing the payoffs from the "big club"; it was suggested that the Vice Squad police officers organize their own "club" among the remaining bars and taverns in the District. Fischer then took this matter up with Braasch who agreed to the proposal. According to Fischer's testimony, when Braasch was apprised of the proposed "club", he commented: "I guess it is not a bad idea if these guys want to make a buck for themselves. We got our own thing going, haven't we?" Braasch's primary concern was that he have a veto power over which establishments would be included.

Braasch was interested not only in making sure that none of the nightclubs in his own "big ten" were being shaken down by the Vice Squad, but also in keeping off the list any "trouble spots" — establishments that catered to prostitutes, operated after hours, or served minors — which might prove embarrassing if the public insisted on police action. Pragmatically, Braasch and Fischer decided not to share in the proceeds of the "little club" for reasons related by Fischer in his testimony. According to Fischer, he told Braasch, when they were privately discussing the "little club" arrangement:

> [I]f there is any complaints on these places and there has to be an arrest made, why, if we weren't taking money from it, why we could tell them to go out and make the arrest. But if we were taking

[3] *Continued*

period that Fischer acted as "bagman", the total payoffs amounted to some $185,000. Braasch received in total about $85,000, and Fischer about $25,000. Barry first received $100 a month as a favor from Braasch, but later $1000 a month when he became Vice-Coordinator; the Captains as a group received $500 a month; the Lieutenants $600 a month; and Cello and Rifkin $200 each per month.

> money from the thing, we would be in kind of an awkward situation. *** So, I suggested that we don't participate, partake in any money in this and besides, "We got our own thing going and let's not get hungry."

Braasch agreed.

The original collectors for the "little club" were Cello, Rifkin, Mascolino and Napier, all of whom were Vice Squad officers, and who subsequently testified as witnesses for the Government. Toward the end of 1966 or early 1967, the members of the 18th District Vice Squad held a meeting in the 18th District station house to discuss the functioning of the extortion "club". At that meeting, the officers discussed the procedures to be followed in protecting their "club" members; they discussed the amount of money that would be paid to each vice officer as more bars were recruited; and they discussed which officers would be responsible for collecting the money on each shift.

While Fischer and Barry were Vice Coordinators, Officers Cello, Rifkin, Mascolino, and Napier distributed the money they collected from the bars among the members of the Vice Squad. Cello, Mascolino, Rifkin, and Napier each received approximately $300 and later $500 per month; the other vice men received $150 and later $250 per month as their share of the "package".

Witness Cello testified in the Government's case-in-chief that the conditions for membership were as follows:

> The conditions were that they would pay $100 a month to the vice officer that would be collecting. In return, there would be no harassment by members of the vice squad. Under harassment, it would be classified as premise checks, I.D. checks of individuals in the bars. If it was a gay bar, you would not go in there with flashlights and harass the patrons of the bar. You would assist them in any trouble that they have. If you were assigned to make a followup report, in your followup report you would try to make it or slant it in any way or form that would help the tavern owners.

> If you received knowledge that there was — any knowledge or any information that VCD was going to come into the district to make a raid on these taverns, you would forewarn them. Also that none of the vice — there would be no individual shakedowns by any individual vice officer on these taverns if a check had to be made on a tavern, it would be checked out first with one of us.

As the years from 1966 to 1970 went on, other Vice Squad officers assisted in the collection tasks for the "little club". In February, 1967, Fischer was promoted and transferred to other duties outside the 18th District, and Barry succeeded him as Vice-Coordinator. Barry took over the duties of intermediary between the "little club" and Braasch, but he received no money from the "little club" operation, his take being the $1,000 heretofore mentioned from the "big club". As indicated above, however, Fischer continued as "bagman" for the "big club" through January, 1969. In 1970, Sergeant Geraghty succeeded Barry as Vice-Coordinator and continued to perform the same services as the latter, except that Geraghty assumed the monthly responsibility of personally receiving the "package" collected from the "little club" and distributing it among the members of the Vice Squad.

A. *The Indictment and Trial:*

On December 29, 1972, a sixteen-count indictment was returned against twenty-four Chicago police officers, charging in the first count that they participated in a conspiracy to commit extortion in violation of 18 U.S.C. §1951 by extracting money under color of official right from the proprietors of the fifty-three liquor establishments comprising the "little club". The remaining fifteen counts of the indictment charged separate violations of 18 U.S.C. §1623.[4] Each count separately

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[4] 18 U.S.C. § 1623 in relevant part provides:

(a) Whoever under oath in any proceeding before or ancillary to any court or grand jury of the United States knowingly makes any false material declaration or makes or uses any other information, including any book, paper, document, record, recording, or other material, knowing the same to contain any false material declaration, shall be

charged one of those named in Count One with making false material declarations to the Grand Jury by appearing before the Grand Jury and falsely denying his participation in the "little club" extortion scheme.[5]

At the trial before Judge William J. Bauer which began on August 13, 1973, the Government presented the testimony of seven police officers who had formerly been assigned to the 18th Police District. Five of them — Fischer, Cello, Rifkin, Mascolino and DuShane — testified under immunity granted pursuant to 18 U.S.C.

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[4] *Continued*

fined not more than $10,000 or imprisoned not more than five years, or both.

(c) An indictment or information for violation of this section alleging that, in any proceedings before or ancillary to any court or grand jury of the United States, the defendant under oath has knowingly made two or more declarations, which are inconsistent to the degree that one of them is necessarily false, need not specify which declaration is false if —

(1) each declaration was material to the point in question, and

(2) each declaration was made within the period of the statute of limitations for the offense charged under this section.

In any prosecution under this section, the falsity of a declaration set forth in the indictment or information shall be established sufficient for conviction by proof that the defendant while under oath made irreconcilably contradictory declarations material to the point in question in any proceeding before or ancillary to any court or grand jury. It shall be a defense to an indictment or information made pursuant to the first sentence of this subsection that the defendant at the time he made each declaration believed the declaration was true.

[5] Of the twenty-three defendants who went on trial, eight were charged only in Count One (conspiracy): Police Sergeant Barry, Police Officers Cale, Catalano, Finn, McGee, Salveson, Seno, and Zakoian. The remaining fifteen were charged in Count One and in one of the fifteen individual counts of false declarations to the Grand Jury: Police Captain Braasch, Police Sergeant Geraghty, Police Officers Armstrong, Batastini, Demke, Eshoo, Flagg, Grana, Lazar, Pierson, Russell, Schillinger, Swallow, Troche, and West.

§ 6002; the sixth, Anthony Corsentino, testified without immunity; and the seventh, Lowell Napier, one of those originally indicted, pled guilty before trial and testified. These officers testified to their own complicity in the "little club" and to the involvement of those on trial. In addition, 48 witnesses were produced by the Government who were owners or employees of the liquor establishments in the "little club"; who testified under a blanket immunity grant, and who asserted that they had personally made payments to the police officers who were collecting extortion money for the Vice Squad. The trial was concluded on October 3rd, and the jury found nineteen defendants involved in the instant appeal guilty, and found four others — Demke, Lazar, Pierson and Troche — not guilty on all charges.

We have read the 6,836-page record and find that it reveals a carefully organized and skillfully operated extortion machine of massive proportions in both membership as well as monetary "take"; which operated over several years and corrupted the entire Vice Squad of the 18th Police District, including its top officials. The testimony of the 48 proprietors and employees of the participating "little club" members established that the extortion payments were made. The testimony of the bagmen Cello, Rifkin, Mascolino and Napier confirmed that they had received the payments and disbursed them to police officers of the Vice Squad as well as to themselves. The testimony of DuShane, who was the police officer assigned to clerical work in the Vice Squad, detailed fiscal arrangements. And the testimony of Fischer explained the organization of the "little club": why certain officers, such as Cello and Rifkin, were included in the payoff of both the "little" and "big" clubs; and the intimate conversations that he had with Braasch that tied the latter inextricably to the "little club" conspiracy and revealed the depths of venality to which Braasch would stoop to protect his "own thing" — the "big club".[6]

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[6] Exclusive of the "big club" evidence pertaining to the motivation of Captain Braasch and his various vice coordinators, a number of factors connect each of the remaining

B. *The Issues Tendered Here:*

The appellants raise the following issues, some sixteen in number:

(1) Were the statutory requirements of 18 U.S.C. §6001 *et seq.* met in granting immunity to various Government witnesses;

(2) Was it proper for the trial court to have suppressed the orders granting such immunity;

(3) Was the grand jury process abused by calling certain prospective Government witnesses before the grand jury after the indictment was returned;

(4) Did the re-assignment of the case to another judge several weeks before trial but after completion of pre-trial motions violate appellants' constitutional protections;

(5) Did the conspiracy "affect commerce" within the meaning of 18 U.S.C. §1951;

(6) Was knowledge and intent sufficiently proven;

(7) Was the evidence sufficient to prove Braasch's participation in the conspiracy;

(8) Was the evidence sufficient to prove that Grana's declarations before the Grand Jury were false;

(9) Was the admission of the evidence as to the "big club" improper as to Braasch and Barry and so highly prejudicial to the other appellants as to have denied them a fair trial;

(10) Were the twenty-four defendants and sixteen counts properly joined in the indictment;

* *Continued*

appellants to the conspiracy. First, most of them received a monthly share of the "package" after joining the District Vice Squad; second, many participated in the actual collecting of money from the victim bars; third, some participated in the distribution of the "package"; fourth, some names appeared on a list indicating that they received a share for one month in early 1967; and, fifth, some officers attended the Vice Squad meeting in late 1966 or early 1967 at which the "club" and the "package" were discussed at length. The evidence at trial from the representatives of the bars and taverns as well as that from Fischer, Rifkin, Cello, and the other officers who testified for the Government tied each of the appellants to one or more of these factors.

(11) Does a police officer's abuse of the power of his official position in order to obtain payments from merchants come within the meaning of 18 U.S.C. §1951's ban on extortion "under color of official right.

(12) Was it proper to admit evidence of a similar extortion scheme within the 18th District antedating the conspiracy at bar;

(13) Was it proper to admit evidence showing the state of mind of the extortion victims;

(14) Did other evidentiary rulings result in prejudice to the appellants;

(15) Did the prosecutor's closing argument constitute reversible error because of his references to the evidence tying appellant Grana to the conspiracy; and

(16) Was there an abuse of discretion in the sentences imposed.

The bulk of these issues are either frivolous or controlled by previous decisions and do not merit extended discussion. We will deal with them in the order above outlined.

C. *Disposition of the Issues:*

I.

Appellants claim that the Government failed to comply with 18 U.S.C. § 6002 which, they argue, requires that a witness actually refuse to testify before being granted immunity. Unfortunately for the success of their claim, 18 U.S.C. § 6003 (b)(2) specifically authorizes the Government to seek such a grant where the witness "has refused *or is likely to refuse* to testify or provide other information on the basis of his privilege against self-incrimination." (Emphasis supplied) Appellants also claim that the trial court's immunity orders were too broad, prohibiting the use of the immunized testimony against bar owner-witnesses not only in criminal trials but also in subsequent state administrative proceedings, such as liquor license revocation hearings. However, we need not pass on this difficult question since appellants have no standing to raise the question. *United States v. Lewis*, 456 F. 2d 404, 410

(3d Cir. 1972); *United States ex rel. Berberian v. Cliff*, 300 F. Supp. 8, 14 (E. D. Pa. 1969). *Cf. Lopez v. Burke*, 413 F. 2d 992, 994 (7th Cir. 1969).

II.

Appellants further claim that suppression of the orders granting immunity to several dozen bar owners violated their Sixth Amendment right to the effective assistance of counsel by being denied important information. The suppression orders were entered by Chief Judge Edwin A. Robson in March of 1973, "[i]n order to encourage further disclosures and in order to protect the personal safety and security of the informers and potential witnesses by concealing their identity." Since, as we have said, a defendant has no standing to contest the propriety of a grant of immunity, it follows that appellants had no right to be present at the immunity hearings nor any right to obtain the identity of Government witnesses by or through being furnished copies of the orders granting immunity. Chief Judge Robson denied appellants' motions to lift the suppression order and we agree with his conclusion on the matter. It also follows that defense counsel had no right to be at the immunity hearings. *Cf. United States v. Bennett*, 409 F. 2d 888, 899 (2d Cir.), cert den. sub. nom *Haywood v. United States*, 396 U.S. 852 (1969), holding that defense counsel's presence is not required when a prosecutor interrogates a prospective witness in preparation for trial. Moreover, no possible prejudice could have arisen since a copy of the immunity orders was provided the defense with the Section 3500 material at the conclusion of the direct examination of the first immunized witness and was used by appellants' counsel in cross-examination.

III.

Appellants next complain that the Government abused the grand jury process by calling prospective witnesses before the Grand Jury for the purpose of preparing an already pending indictment for trial. The short answer is that the Government has every right to interrogate witnesses on subjects relevant to a continuing grand jury investigation even when the evidence received may

also relate to a pending indictment. *Beverly v. United States*, 468 F. 2d 732, 742 (5th Cir. 1972). Appellants have shown no prejudice from these occurrences and their contention must fail. *United States v. Star*, 470 F. 2d 1214, 1217 (9th Cir. 1972).

IV.

Appellants next claim that their constitutional protections were violated because of the transfer of the case to another judge. This is frivolous. A litigant does not have a right to have his case heard by a particular judge. *United States v. Dichiarinte*, 385 F. 2d 333, 337 (7th Cir. 1967), cert. den., 390 U.S. 945 (1968); *United States v. Stone*, 411 F. 2d 597, 598-9 (5th Cir. 1969). The fact that the original judge decided pretrial motions is of no consequence. In central calendar courts that is done every day. *United States v. Marachowsky*, 213 F. 2d 235, 244 (7th Cir. 1954), clearly approves the action of one judge sitting for another to make any order necessary to preserve the rights of the parties.

V.

Appellants also challenge the technical sufficiency of the Government's proof that their conduct "affects commerce" within the meaning of 18 U.S.C. § 1951. At the outset we note that there were no objections to the trial court's instructions as to what constitutes effect on commerce. Section 1951 proscribes extortion which "in any way or degree obstructs, delays or affects commerce or the movement of any article or commodity in commerce . . ." As this Circuit held in *United States v. De Met*, 486 F. 2d 816 (7th Cir. 1973), cert. denied, 94 S.Ct. 1991 (1974):

> Because Congress has seen fit to exercise its full power under the commerce clause, extortionate conduct having an arguably *de minimus* effect on commerce may nevertheless be punished. [486 F. 2d at 821]

The record indicates that representatives of eleven Chicago area wholesale distributors of beer and liquor testified as to their purchases of alcoholic beverages

from numerous locations outside the state and six other wholesale distributors were included by stipulation. Voluminous sales and purchase records of the establishments in the "little club" were admitted into evidence. The dependence of the Chicago retail liquor establishments upon interstate commerce for a supply of alcoholic beverages was fully covered by the testimony of the Chief of Technical Services Branch of the Office of the Regional Director of the Mid West Region of the Alcohol, Tobacco and Firearms Bureau. It revealed a limited number of distilleries and wine manufacturers located in the State of Illinois during the period covered by the conspiracy. This proof shows that the impact on interstate commerce was substantial rather than *de minimis*. Nor is there merit to the further contention that the warehousing of the alcoholic beverages prior to sale severs the interstate nexus. *See United States v. Gill*, 490 F. 2d 233, 236 (7th Cir. 1973).

VI.

Appellants also claim that they did not know of either the extortionate nature of the conspiracy, the source of the money they received, or the interstate impact of their involvement. It may well be that each of the appellants did not know of the minute details of the operation of the "little club", but once the conspiracy was established — the evidence of which was overwhelming — slight evidence is sufficient to connect a particular participant. *See United States v. Robinson*, 470 F. 2d 121, 123 (7th Cir. 1972); *United States v. Marrapese*, 486 F. 2d 918, 921 (2d Cir. 1973); *United States v. Nunce*, 483 F. 2d 453, 460 (9th Cir. 1973). Each of the appellants were Chicago police officers assigned to the vice squad, except Braasch who was their boss; each received money every month from the "little club" operation, except Braasch, Fischer and Barry; they knew the money was not due them or their office by reason of their official position; the record directly connects most of the officers with the fact that the money came from the liquor establishments since four of them were collectors of it and others were present when money was collected: Armstrong, Batastini, Catalano,

Eshoo, Finn, Flagg, Grana, Russell, Salvesen and Seno; the operation of the club was freely discussed among the vice officers; Barry was told all about it when he first became Vice-Coordinator; a meeting of the Vice Squad members was held in the 18th District Police Station for the purpose of discussing the "little club"; and Officer DuShane testified that he had conversations about the "little club" with every vice officer assigned to the District during the time in question. Moreover, during the entire relevant period — 3½ years — only three arrests were made by the Vice Squad officers at the 53 bars that were in on the "little club", and after March, 1967, not a single arrest was made by any member of the Vice Squad. In our view the evidence was overwhelming.

VII.

In arguing the insufficiency of the evidence to support his conviction, Braasch specifically attacks the credibility of Fischer. That, of course, was a matter the jury decided against Braasch, and we have no power to set aside their determination on the point. Besides, Fischer was corroborated in large part by Cello, Rifkin, and Napier.

VIII.

Grana claims that the Government failed to prove beyond a reasonable doubt that he made false declarations to the Grand Jury as alleged in Count Seven, relying on *Bronston v. United States*, 409 U.S. 352 (1972). But that case is not apposite, since it involved an ambiguous question and a true but unresponsive answer. The questions put to Grana were not ambiguous nor were his answers unresponsive. Indeed, the latter were unequivocal negative responses to questions probing his knowledge of and participation in the extortion scheme.

IX.

As we have indicated in our factual resume, the Government introduced evidence concerning a "big club" payoff that was not alleged in the indictment. It was introduced solely for the purpose of establishing in-

tent and motive as to Braasch and Barry's participation in the "little club" conspiracy and the trial court so advised the jury with carefully worded instructions. Braasch and Barry, who received none of the proceeds from the "little club", assert that the jury was so inflamed by this evidence that it convicted them for that crime rather than the one charged in the indictment. The remaining appellants also claim prejudice and assert that the jury was confused by the introduction of this separate and uncharged conspiracy into the case. In response, the Government asserts that Fischer's role as Braasch's "bagman" for the "big club" payoffs — a role later undertaken by Barry — was absolutely necessary to paint the whole picture of the "little club" operation and to explain the motive of Braasch, Fischer, and Barry in approving its organization. Since Braasch and his Vice Coordinators had their "own thing going", it was necessary to protect that operation, i.e., the "big club". By examining the monthly lists of establishments in the "little club" which were submitted for his approval, Braasch was able to make certain that there would be no conflict between the two operations. Moreover, the record shows that word of the "big club" had gone the rounds of the Vice Squad and there was dissatisfaction because the Vice Squad was not in on the take. It is a reasonable inference that Braasch concluded that unless he took steps to satisfy the Vice Squad, this dissatisfaction would increase as time passed and disclosure of the "big club" would inevitably result.

It is well-established that proof of motive is one of the exceptions to the general rule that evidence of "other crimes" not charged in the indictment is inadmissible in the prosecution's case-in-chief. *See United States ex rel. Durso v. Pate*, 426 F. 2d 1083, 1086 (7th Cir. 1970), cert. denied, 400 U.S. 995 (1971). As in most questions regarding the admissibility of evidence, trial judges are given wide discretion to balance the proffered item's probative value against its prejudicial effect. *See United States v. Gaus*, 471 F. 2d 495, 499 (7th Cir.) cert. denied, 412 U.S. 938 (1973). We can see no abuse of discretion here.

True it is that detailed evidence as to a similar, contemporaneous conspiracy has a potentially prejudicial effect, but here that effect was outweighed by the importance of this motive evidence as well as the District Court's cautious and thorough limiting instructions which were delivered to the jury not only at the conclusion of witness Fischer's direct examination but again after witnesses Cello and Murphy testified briefly as to their involvement in the "big club", and for a third time in the final charge to the jury. These instructions specified that the "big club" evidence was not to be used against any other of the defendants besides Braasch and Barry, and as to them it was only to be considered as it relates to their motive and intent to participate in the "little club" conspiracy charged in the indictment. We have no reason to doubt the effectiveness of these carefully drawn instructions. *See United States v. Pauldino*, 443 F. 2d 1108, 1114 (10th Cir.), cert. denied, 404 U.S. 882 (1971). The jury verdict — in which four of the twenty three defendants were acquitted — itself supports this conclusion.

Appellant Braasch additionally claims that his constitutional right to be informed of the nature and cause of the accusation against him, guaranteed by the Sixth Amendment, was infringed by the omission of any mention of the "big club" in the indictment. The right to be informed of the accusation is a central right in our constitutional system, but it does not place a limitation on the evidentiary rule which allows the introduction of "other crimes" evidence in the proper circumstances. *Cf. McConkey v. United States*, 444 F. 2d 788, 789 (8th Cir.), cert. denied, 404 U.S. 885 (1971). Here the Government notified counsel for Braasch on August 27th, some two weeks before Fischer testified — and weeks before it closed its case — that it would introduce just such evidence pertaining to his involvement in uncharged criminal conduct in order to prove his motive for participating in the "little club". *United States v. Baum*, 482 F. 2d 1325 (2d Cir. 1973), on which appellant Braasch relies, is therefore distinguishable since appellant had both notice and opportunity to meet the Government's proof of concurrent criminal conduct.

X.

Appellants argue that it was prejudicial under Fed. R. Crim. P. 14 to join the conspiracy count which names all of the 24 conspirators, with the 15 separate perjury counts, each of which named a single conspirator. They rely on the panel opinion in *United States v. Pacente*, 490 F. 2d 661 (7th Cir. 1973), which reversed the convictions of a Chicago police officer on a similar indictment charging both extortion and perjury. Since the time that briefs were submitted in the present case, however, an *en banc* reconsideration of the *Pacente* opinion has resulted in its reversal, *United States v. Pacente*, No. 72-1988 (7th Cir., filed August 6, 1974), so that such a joinder has now been given full approval by this circuit. Morever in the instant case, the trial judge in his charge specifically instructed the jury to give separate consideration to each count and to render separate verdicts on each defendant. The charge admonished the jury further that each defendant was entitled to have his guilt or innocence determined from his own conduct and from the evidence as applied to him as if he were being tried alone and that the guilt or innocence of any one defendant should not influence the jury's verdict respecting the others. Further, with regard to the perjury counts, the charge instructed that testimony introduced as to them was to be considered only as evidence of the false material declaration charge and that the jury should not consider that testimony as evidence of any defendant's guilt as to Count One of the indictment. The fact that the jury found four of the defendants not guilty on both the conspiracy and the respective perjury counts showed that they not only knew what they were doing but did what they intended. *See United States v. Gill*, 490 F. 2d 233, 239 (7th Cir. 1973). We add that the massive duplication of effort entailed in separate trials is not justified absent a more specific claim of prejudice than the one now urged by appellants. *Cf. United States v. Haim*, 218 F. Supp. 922, 932 (S.D. N.Y. 1963); *United States v. Verra*, 203 F. Supp. 87, 90 (S.D. N.Y. 1962).

Some of the appellants contend that the joinder of so many defendants in a single indictment deprived them

of the privilege of calling a co-conspirator to the stand to testify in their behalf. None of the appellants, save Braasch, attempted to make any positive showing of either the utility or the availability of such testimony. As this circuit has held again and again "[t]he unsupported possibility that such testimony might be forthcoming does not make the denial of a motion for severance erroneous". *United States v. Kahn*, 381 F. 2d 824, 841 (7th Cir.), cert. den., 389 U.S. 1015 (1967). Braasch claims that his co-defendant Barry could have testified that Fischer (the Government's star witness against Braasch) told Barry that he (Fischer) had denied to the Government any involvement in any extortion scheme, stating to Barry further: "They [the prosecutors] want Braasch and the only way I could give them Braasch is to lie". However, when the trial judge held an in-chambers *voir dire* on the matter, Barry invoked the Fifth Amendment and refused to answer all questions, including whether he would testify on behalf of Braasch in a separate trial if severance was granted. The facts here are, therefore, a far cry from the leading case of *United States v. Echeles*, 352 F. 2d 892 (7th Cir. 1965), where a co-defendant repeatedly offered to give obviously exculpatory testimony. Barry's refusal to give such assurance left Braasch without that one element which was essential to his motion for severance. *See United States v. Johnson*, 426 F. 2d 1112, 1116 (7th Cir. 1970); *United States v. Caci*, 401 F. 2d 664, 672 (2d Cir. 1968).

XI.

The appellants assert that the crime, if any, charged and proven here is not cognizable under the provisions of the Hobbs Act utilized in the indictment, i.e., extortion "under color of official right". Extortion "under color of official right" as used in the Act, they say, means either the acceptance of money by a public official to perform an act that he was already under a legal duty to perform or, alternatively, the taking of money under a claim by the officer that he had an official right to the money by virtue of his office. Here, they urge, the proof showed only that the appellants took

money to refrain from performing their duties and thus their conduct could not be included in the statutory phrase "under color of official right", but instead "constitutes classic bribery", citing *People v. Dioguardi*, 8 N.Y. 2d 260, 203 N.Y.S. 2d 870 (1960), and other New York cases. Pursuing this line of argument, appellants contend that there was a fatal variance between indictment and proof since the conduct proved did not fall within the "official right" extortion charged and the Government failed to charge them with the other type of extortion covered by the first clause of 18 U.S.C. § 1951 (b)(2) — extortion by the wrongful use of actual or threatened force, violence or fear.

Appellants, however, overlook the fact that the evidence shows that the conspirators used the power and authority vested in them by reason of their office to obtain money not due them or due the office. The use of office to obtain payments is the crux of the statutory requirement of "under color of official right", and appellants' wrongful use of official power was obviously the basis of this extortion. *See United States v. Staszcuk*, No. 73-1869 (7th Cir., filed Sept. 10, 1974). It matters not whether the public official induces payments to perform his duties or not to perform his duties, or even, as here, to perform or not to perform acts unrelated to his duties which can only be undertaken because of his official position. So long as the motivation for the payment focuses on the recipient's office, the conduct falls within the ambit of 18 U.S.C. § 1951. That such conduct may also constitute "classic bribery" is not a relevant consideration.[7]

The police officers of the vice squad harassed bars, taverns and liquor establishments through their official position by making unusually frequent premise checks (four times a day) and identification examinations of patrons; they inspected bars catering to homosexuals

[7] As appellants themselves point out, "the modern trend of the federal courts is to hold that bribery and extortion as used in the Hobbs Act are not mutually exclusive. *United States v. Kahn*, 472 F. 2d 272, 278 (2d Cir. 1973), *cert. den.*, 411 U.S. 982, 93 Sup. Ct. 2270."

with flashlights and harassed the patrons; they individually "shook down" proprietors often; they set-up under-aged drinkers in bars in order to frame a violation of law; and they sent liquor licensing authorities false reports about bars resulting in cancellations. In short, a set of roving police officers preyed upon the vulnerable position of the bars in the 18th District for their own profit. The proprietors wished to stop this sort of harassment, and the payment of "protection" money appeared to be the only answer. It may be that some of the payments were made from fear of economic harm which does come within the type of coercive extortion prohibited by the first clause of 18 U.S.C. § 1951 (b)(2) and not by the clause relating to extortion "under color of official right".[8] Nevertheless, it was appellants' misuse of the power of their office that triggered the harm as well as the payments in this case and made it the type of extortion charged in the indictment. We must, therefore, reject their contention.

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[8] It may be true that duress is an essential element of a case prosecuted under the provision of the Hobbs Act relating to "wrongful use of actual or threatened force, violence or fear", but coercive extortion is not the only type outlawed by the Act. The other is inducing payoffs "under color of official right"; and that offense does not require proof of coercion. Few cases have dealt with the distinction between these offenses, but several are relevant. *See United States v. Kenny*, 462 F. 2d 1205 (3d Cir.), cert. den., 409 U.S. 914 (1972). *See also United States v. Nardello*, 393 U.S. 286 (1969). (Warren, C.J.) (discussing labels and classification of extortion offenses by the states); *Bianchi v. United States*, 219 F. 2d 182, 193 (8th Cir.), cert. den., 349 U.S. 915 (1955); *United States v. Sutter*, 160 F. 2d 754, 756 (7th Cir. 1947); *United States v. Hyde*, 448 F. 2d 815, 832-4 (5th Cir. 1971), cert. den. 404 U.S. 1058 (1972); *United States v. Pranno*, 385 F. 2d 387, 390 (7th Cir. 1967), cert. den., 390 U.S. 944 (1968); *United States v. De Met*, 486 F. 2d 816, 823 (7th Cir. 1973), (Swygert, C. J., concurring). Here, the Congress intended to and did exercise all of its power under the Constitution, and the Act is to be construed broadly. *United States v. Pranno*, 385 F. 2d at 389. *See Also* Stern, "Prosecutions of Local Political Corruption Under the Hobbs Act: The Unnecessary Distinction Between Bribery and Extortion"; 3 Seton Hall L. Rev. 1 (1971).

CONCLUSION

We have carefully considered the remaining issues raised by appellants regarding admissibility of background, state of mind and other evidence, the prosecutor's closing argument, and the trial judge's sentencing of appellants. We find these claims without merit and therefore affirm the judgment.

AFFIRMED.

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APPENDIX B

- Opinion by Justice Clark -

United States Court of Appeals

FOR THE SEVENTH CIRCUIT

Chicago, Illinois 60604

October 23, 1974

Before

Hon. TOM C. CLARK, Associate Justice, Supreme Court*

Hon. THOMAS E. FAIRCHILD, Circuit Judge

Hon. JOHN PAUL STEVENS, Circuit Judge

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

No. 74-1000 thru 1017, 74-1105 vs.

CLARENCE E. BRAASCH, et al.,
Defendants-Appellants.

Appeal from the United States District Court for the Northern District of Illinois Eastern Division

This cause came on to be heard on the transcript of the record from the United States District Court for the Northern District of Illinois, Eastern Division, and was argued by counsel.

On consideration whereof, it is ordered and adjudged by this court that the judgment of the said District Court in this cause appealed from be, and the same is hereby, AFFIRMED, in accordance with the opinion of this Court filed this day.

*Honorable Tom C. Clark, Associate Justice (Retired) of the Supreme Court of the United States, is sitting by designation.

APPENDIX C

United States Court of Appeals

For the Seventh Circuit

Chicago, Illinois 60604

November 21, 1974

Before

Hon. TOM C. CLARK, Associate Justice

Hon. THOMAS E. FAIRCHILD, Circuit Judge

Hon. JOHN PAUL STEVENS, Circuit Judge

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

vs.

CLARENCE E. BRAASCH, et al.,
Defendants-Appellants.

No. 74-1000 thru 74-1017 and 74-1105

Appeal from the Untied States District Court for the Northern District of Illinois, Eastern Divsn.

(72 CR 979)

This matter comes before the court on the five separate petitions for rehearing filed herein by various defendants-appellants. They are:

The "Petition For Rehearing en banc" filed herein on November 5, 1974 by counsel for defendants-appellants, Natale Cale, John Catalano, Edward Finn, Harry Salvesen, Steve Seno and William Swallow;

The "Petition For Rehearing On Behalf Of Appellants Daniel Armstrong, Thomas Batastini, Martin Eshoo, Carl Flagg, Emmons Russell, Joseph Schillinger and Thomas West" filed herein on November 6, 1974;

The "Petition For Rehearing en banc" filed herein on November 6, 1974 by defendant-appellant Edward J. Barry, pro se;

The "Petition For Rehearing In Banc By Defendant-Appellant Clarence E. Braasch" filed herein on November 7, 1974. And

"Petition For Rehearing On Behalf Of Edward McGee, Philip R. Grana, John M. Geraghty And Mike Zakoian", which requests en banc consideration on page eleven thereof, filed herein on November 7, 1974.

No judge in active service has requested a vote thereon, and no judge has voted to grant the suggestion for in banc consideration. All the members of the panel have voted to deny rehearing in each of the aforesaid petitions. On consideration whereof,

IT IS ORDERED that all five of the petitions for rehearing filed herein be, and they are hereby, DENIED.

NOTE: Judge Philip W. Tone disqualified himself from consideration of any of these petitions.